

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Ramon Del Rio,

Petitioner,

vs.

Matthew Cate, Secretary,

Respondent.

Civil No. 11cv728 DMS (PCL)

**REPORT AND RECOMMENDATION
GRANTING RESPONDENT'S MOTION
TO DISMISS**

(Doc. 17.)

INTRODUCTION

In 1977, Petitioner Ramon del Rio was convicted of two counts of first degree murder, for which he is currently serving an indeterminate life sentence. (Doc. 1, at 15, 68.) On April 6, 2011, Petitioner filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. (Doc. 1.) The Petition contains three claims: 1) ineffective assistance of counsel; 2) due process violation as Petitioner has not been able to obtain DNA testing of evidence introduced at trial; and 3) prosecutorial misconduct. (Doc. 1, at 1-3.) Respondent filed a Motion to Dismiss the Petition on the ground that the Petition is a successive petition for which Petitioner has not obtained circuit court approval for filing as required under 28 U.S.C. § 2244(b)(3)(A). (Doc. 17-1, at 5.) Petitioner filed numerous appeals and petitioned the state and federal courts for writs of habeas corpus, including in this Court, case no. 93-1834 IEG (RBB). (Doc. 17-1, at 3.) For the following reason, the Court recommends GRANTING Respondent's Motion to Dismiss.

1 **DISCUSSION**

2 This Petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act
3 of 1996 (“AEDPA”). See Lindh v. Murphy, 521 U.S. 320 (1997). As amended by AEDPA, 28 U.S.C.
4 § 2244 provides, in pertinent part:

5 Before a second or successive application permitted by this section is filed in the district court,
6 the applicant shall move in the appropriate court of appeals for an order authorizing the district
7 court to consider the application.

8 28 U.S.C. § 2244(b)(3)(A).

9 As described by the Supreme Court, Section 2244(b)(3) acts as a gatekeeping system for second
10 petitions in which the habeas petitioner must obtain leave from the court of appeals before filing the
11 second habeas petition in the district court. Felker v. Turpin, 518 U.S. 651, 663 (1996). If the petitioner
12 fails to obtain authorization from the Court of Appeals before filing his successive habeas petition in
13 the district court, the district court must dismiss the habeas petition for lack of jurisdiction. Burton v.
Stewart, 549 U.S. 147, 157 (2007).

14 Here, Petitioner already filed a federal habeas petition in his case in 1993. Returning to federal
15 district court with a successive petition, Petitioner has failed to obtain circuit court approval first before
16 filing his successive habeas petition in this Court. Thus, this Court should dismiss the Petition for lack
17 of jurisdiction and should GRANT Respondent’s Motion.

18 **CONCLUSION**

19 The Court submits this Report and Recommendation to United States District Judge Dana
20 Sabraw under 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c)(1)(c) of the United States District
21 Court for the Southern District of California. For the reason outlined above, IT IS HEREBY
22 RECOMMENDED that the Court issue an order: (1) approving and adopting this Report and
23 Recommendation, and (2) directing that the Petition be dismissed.

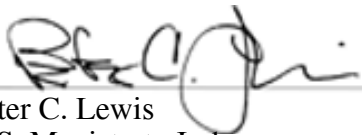
24 IT IS ORDERED that no later than **November 10, 2011**, any party to this action may file written
25 objections with the Court and serve a copy on all parties. The document should be captioned “Objections
26 to Report and Recommendation.”

27 IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and
28 served on all parties no later than **November 18, 2011**. The parties are advised that failure to file
objections within the specified time may waive the right to raise those objections on appeal of the

1 Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
2 1153, 1156 (9th Cir. 1991).

3 **IT IS SO ORDERED.**

4 DATED: October 27, 2011

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6 Peter C. Lewis
7 U.S. Magistrate Judge
8 United States District Court
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